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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 452

CARGO SHIPS & TANKERS, INC.,

Petitioner,

—against—

JOHN A. RUSH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1966

No.

CARGO SHIPS & TANKERS, INC.,

Petitioner,

—against—

JOHN A. RUSH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Cargo Ships & Tankers, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on May 20, 1966.

Proceedings Below

Judgment was entered in the United States District Court for the Southern District of New York on June 1, 1965 in favor of the respondent after a trial by jury.

On appeal to the United States Court of Appeals for the Second Circuit the aforesaid judgment was

affirmed resulting in the judgment which petitioner seeks to have reviewed by this Court. The opinion is reported at 360 F. 2d 766. Petitioner's petition for rehearing on a point not involved herein was denied on June 14, 1966.

Jurisdiction

The judgment of the Court of Appeals was dated May 20, 1966 and was entered on May 20, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Did the Court of Appeals err in affirming the trial court's refusal to charge the jury to disregard that portion of respondent's counsel's summation that pain and suffering should be measured in dollars on a "unit of time" basis?

Reasons for Granting the Writ

1. The question presented raises a legal procedural issue affecting the rights of all litigants, including maritime employers sued under the Jones Act, 46 U.S.C. 688 and the general maritime law of unseaworthiness where the procedural principle of law is Federal rather than State.

2. There is a conflict between the holding of the court below in the present case and the holding in the case

of *Johnson* v. *Colglazier*, 348 F. 2d 420 (5 Cir. 1965) and *Pennsylvania R. Co.* v. *McKinley*, 288 F. 2d 262 (6 Cir. 1961).

3. The court below has decided an important question of federal law which has not been, but should be, settled by this Court.

4. The majority of cases litigated today are jury trials and they involve a claim for damages for personal injuries.

Statement

The jury awarded the respondent, an able-bodied seaman, the sum of $45,107.00 in damages for personal injuries arising during the course of his employment on petitioner's vessel.

The appeal to the Circuit Court of Appeals was from the Judgment entered in the United States District Court for the Southern District of New York upon the jury verdict.

The pertinent facts may be briefly summarized as follows:

Respondent, age 49, an able-bodied seaman on board the petitioner's SS "Adolph Sperling" was injured on July 12, 1960 on a dock at Swan Island, Oregon shortly after the vessel berthed. His injuries involved bilateral fractures of the heel bone.

At the close of the summation by the attorney for the respondent, petitioner timely objected to the re-

spondent's summation in regard to pain and suffering in dollars on a unit-of-time basis and requested the court to charge the jury to disregard it. There was no lay or expert evidence to support the mathematical formula used by respondent's attorney. The court overruled the objection, refused to so charge and stated

> "I would like to see the Second Circuit take a position, and so I am going to deny your application against the possibility that if there is a plaintiff's verdict in this case the defendant chooses to appeal, that one of the bases of the appeal might be my ruling in denying your application so as to set before the Second Circuit four square the necessity of a pronouncement by the Second Circuit as to whether the unit rule in summation on pain and suffering, the dollar value per unit is good or bad."
>
> * * * *
>
> "Of course I will say that my ruling is in some measure buttressed by the fact that in this particular motion, after suggesting a per diem, so to speak, plaintiff's counsel did indicate to the jury that it was only a suggestion and that they might find that he was too high or too low, and that ultimately their determination of the value of pain and suffering was theirs which would control, but in any event I have given you an indication of my denial of your application, to which you are given an appropriate exception."

The appellate court stated (p. 769):

> "Finally, appellant suggests that it was reversible error when the court refused to charge the

jury to ignore plaintiff's counsel's argument concerning a unit of time or per diem measurement of damages for pain and suffering. Despite the fact that the great weight of authority adopts a flat rule, either approving or disapproving such argument, see the cases collected in *Johnson* v. *Colglazier*, 348 F. 2d 420 (5 Cir. 1965), we are unwilling to adopt such a rule. See *Pennsylvania R. Co.* v. *McKinley*, 288 F. 2d 262 (6 Cir. 1961). We do not necessarily agree, however, with that language of *McKinley* which suggests that the appellate court will reverse only if there resulted 'a miscarriage of justice or deprived one of the parties litigant of a fair trial.' 288 F. 2d at 267.

"We do hold that under the circumstances of this case as disclosed by the record before us, it was proper to deny the request. While the argument itself was not reported, and therefore is not before us, a circumstance we regret, there is no suggestion that there was an improper appeal to passion and prejudice other than the bare words used. Furthermore, as the trial judge noted, plaintiff's counsel indicated that his figures were only suggested, that the jury might find them too high or too low, and that it was the jury's determination that controlled."

The respondent was out of work for fifteen months after the accident with resulting loss of wages of $7,500.00. Respondent's accident was on July 12, 1960. He was declared fit for duty on January 12, 1961 and July 13, 1961. His last day of treatment was December 7, 1961. The Baltimore Marine Hospital records showed steady improvement with less

pain. He returned to work on July 21, 1961 and was medically fit for duty for service as an able-bodied seaman on twelve-fifteen vessels on which he was employed after the SS "Adolph Sperling". Respondent admitted that up to the time of trial that he had shown a steady improvement with less pain from his injuries. There was no claim for maintenance and cure or for diminution in earning power or loss of future wages after the time of trial.

There was no lay or expert testimony as to the monetary value of pain and suffering on a unit-of-time basis or any other basis. In summation to the jury, the attorney for the respondent used as a unit-of-time basis for pain and suffering $16.00 per day or $500.00 per month for the period of fifteen months, the loss of time from work by reason of the accident. In regard to respondent's life expectancy of eighteen years, the attorney used the unit of $5.00 per day or $1,800.00 per year. This formula showed the following:

1.	Fifteen months time $16.00 per day or $500.00 per month		$18,750.00
2.	$5.00 per day or $1,800.00 per year times eighteen years		32,400.00
3.	Lost wages	$7,500.00	
4.	One-half travelling expenses Portland to Baltimore..	150.00	7,650.00
			$48,800.00

The jury award was $45,107.00. The difference between the total claim of the respondent and the jury award is exactly $3,693.00.

The court charged the jury that respondent's life expectancy was twenty years rather than eighteen years. There is no way of telling whether or not the jury used a life expectancy of eighteen or twenty years. If the jury used twenty years as the measure, then the difference between the jury's verdict and the total claim of the respondent is exactly $7,293.00.

Argument

There was no lay or expert testimony before the jury as to the monetary value of pain and suffering on a unit-of-time basis or any other basis to support the mathematical summation used by respondent's attorney. The trial court disregarded the basic procedural principle of law which requires summation to be based on record testimony. Pain and suffering cannot be measured forensically in dollars on a unit-of-time basis. Historically and today, a jury or judge sitting without a jury, measures pain and suffering in their sound discretion as an estimation of the conscience of the community of what is fair and reasonable. The violation of the procedural rule cannot be justified by the trial and appellate court's statement that respondent's counsel's figures were only suggestions which the jury might find too high or too low and that it was the jury's determination that controlled. Nor can the violation be justified by the statement of the appellate court that there was no suggestion that there was an improper appeal to passion and prejudice other than the bare words used (p. 769). The trial and appellate court overlooked the well-established psychological principle of the

power of suggestion. In *Johnson* v. *Colglazier* (supra) the Fifth Circuit stated that such a suggestion was (p. 425):

> ". . . nothing more than an attempt to mislead the jury by taking it down a back alley."

The appellate court recognized that the bare words used were indeed an improper appeal to passion and prejudice. Implicit in the mathematical formula and the bare words used is an improper appeal to passion and prejudice without a foundation based on record evidence. The formula is also designed to cause and invariably results in excessive verdicts.

POINT I

The summation in regard to pain and suffering in dollars on a unit-of-time basis is per se improper and reversible error.

The opinion of the appellate court below points up at page 769 the conflict between the Fifth, Sixth and Second Circuits, as to the propriety of such an argument. That portion of the opinion is printed herein at page 4-5 (supra). In addition to the cases collected in *Johnson* v. *Colglazier*, 348 F. 2d 420 (5 Cir. 1965) which flatly holds such an argument to be reversible error are:

Paley v. *Brust*, 21 A.D. 2d 758, 250 N.Y.S. 2d 356 (1st Dept. App. Div. June 9, 1964)

Jacobs v. *Peress*, 24 A.D. 2d 746, 263 N.Y.S. 2d 675 (1st Dept. App. Div. October 19, 1965)

Franco v. *Fujimoto*, 47 Haw. 408, 390 P. 2d 740 (Supreme Ct. Hawaii, March 24, 1964)

Boop v. *Baltimore & Ohio R.R. Co.,* 118 Ohio App. 171, 193 N.E. 2d 714 (1963)
Heddendorf v. *Joyce,* (Dist. App. Fla.) 178 So. 2d 126
Collins v. *Windham,* (Supreme Ct. Alabama 1964) 167 So. 2d 690.

Conclusion

It is respectfully submitted that the trial and appellate court below erred in allowing the respondent's summation to the jury based in dollars on a unit-of-time measurement for pain and suffering. Such an argument violates the basic principle that summation must be based upon record testimony which was absent in this case. Furthermore, the courts below and litigants need guidance and direction as to whether or not a rule of the Fifth, Sixth or Second Circuit should be adopted as a matter of federal law.

In order to assure equal treatment under the law, it is necessary that the conflict of opinion between lower courts be resolved by the Supreme Court of the United States. The litigants in the Fifth, Sixth and Second Circuit are bound by different principles of law which can only result in unequal treatment depending upon the Circuit in which the case is tried. The question presented raises a legal issue which involves an important principle of federal procedural law in all federal trials, including maritime cases where federal trial procedure rather than state trial procedure is applicable. The majority of litigated

cases today involve jury trials of personal injuries. The important principle presented here has not been settled by this Court or by the circuit courts.

Respectfully submitted,

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EDWIN K. REID
HOWARD M. MCCORMACK
Of Counsel

Opinion, Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 355—September Term, 1965.

(Argued April 28, 1966 Decided May 20, 1966.)

Docket No. 29972

JOHN A. RUSH,

Plaintiff-Appellee,

—v.—

CARGO SHIPS & TANKERS, INC.,

Defendant-Appellant.

Before:

SMITH, KAUFMAN and FEINBERG,

Circuit Judges.

Appeal by shipowner from a judgment of the United States District Court for the Southern District of New York, Sidney Sugarman, *Judge,* after trial by jury, in favor of plaintiff seaman on Jones Act claim, 46 U. S. C. §688, and on a claim for unseaworthiness. Affirmed.

GEORGE J. ENGELMAN, New York, N. Y., for plaintiff-appellee.

EDWIN K. REID, New York, N. Y. (Howard M. McCormack, and Zock, Petrie, Sheneman & Reid, New York, N. Y., on the brief), for defendant-appellant.

SMITH, *Circuit Judge*:

Cargo Ships & Tankers, Inc., owner of the S.S. Adolph Sperling, appeals from a judgment in favor of John A. Rush, a seaman aboard that ship, on his claim for negligence and unseaworthiness, after trial by jury before Judge Sugarman. We find no error and affirm the judgment.

Rush was injured after he slipped or jumped from the side of the ship to the dock at Swan Island, Oregon, shortly after the ship had arrived from Singapore. According to Rush, he was told to jump to shore by the mate or boatswain, to hook up a shore gangway. He climbed over the rail, and onto a ledge used to protect the ship's gangway, and slipped on some substance, probably garbage, and fell onto the dock, a distance of six feet. Frequently garbage from the galley was thrown over at that point. Rush injured both heels, was hospitalized with casts on both legs for some time, and complained of pain in walking or standing for prolonged amounts of time. He brought suit under the Jones Act, 46 U. S. C. §688, and for unseaworthiness, asking damages of $48,800, of which $41,150 was for past and future pain and suffering. The jury awarded him $45,107.

Appellant first claims that its motions for a directed verdict and for judgment notwithstanding the verdict should have been granted. The District Court properly denied these motions. Plaintiff testified that either the mate or boatswain said. "A couple of you men jump down on the dock and hook up the gangway," when he was three feet from the mate and boatswain, and the nearest any other seaman was from

them was six feet. Although Rush also described this purported order in other, possibly conflicting terms, the jury was free to believe the version just described. Seaman Bean testified that he examined the ledge, and saw some skid marks in scum there, and that the galley often threw garbage over the side there. Deck Engineer Chuckel testified that he heard the mate give an order saying "one of you fellows get on the dock," or words to that effect, and that at that time Rush was about one foot from him, and he was two to three feet from the mate. He considered the order "foolish." The mate testified that he gave no order to jump, rather that he told the boatswain to lower an aluminum ship's ladder, and let a couple of men go down it to the dock and rig the shore gangway. He stated that when Rush landed, the aluminum ladder was already lowered, and one man, Richardson, had just then arrived on the dock. Plaintiff's witnesses, however, said that the aluminum ladder was lowered some time after Rush jumped or fell. Defendant's witness Burton, the Immigration Officer, testified that he heard no order to jump, and that when Rush landed there was no ladder or gangway out. And the Quarantine Officer, Stanley, testified that he heard no order to jump.

All this merely created a number of factual issues for the jury, the resolution of which went against defendant. The jury could have found a negligent order, and the injury a proximate result of it, rather than of any scum or garbage on the ledge. On the other hand, the jury could have found that it was not an improvident order and that it would be a proper order for a somewhat unusual method of egress, that

there was scum or garbage, and that therefore the ship was unseaworthy. There was more than enough evidence to get to the jury on the Jones Act claim, in view of the near scintilla test for going to the jury under that Act, *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 523 (1957), and there was enough evidence of unseaworthiness.

Next, appellant argues there was error in refusing certain requests to charge. The first was, in connection with the negligence issue, that "When the plaintiff boarded defendant's vessel, he accepted all the various and well-known risks of his calling." The Court did charge that while it was defendant's continuing duty to use ordinary care, "this does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work." A charge virtually identical to the one requested here was made and permitted in *Roberts* v. *United Fisheries Vessels Co.*, 141 F. 2d 288 (1 Cir.), cert. den. 323 U. S. 753 (1944), and in *Myers* v. *Isthmian Lines, Inc.*, 282 F. 2d 28 (1 Cir. 1960), cert. den. 365 U. S. 804 (1961). It is correct that a seaman "assumes the risk" of his calling, even though "assumption of risk," a quite different matter, see *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, 68-9 (1943) (concurring opinion), is no defense in a Jones Act suit, *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (1939). But it is not error to refuse the charge requested here. That an employee "accepts" or "assumes" the "ordinary" or "various and well-known" risks of his calling means that an employee injured as a result of being exposed to a risk not avoidable by the employer's *due care*, cannot re-

cover for negligence. This being true, and since negligence and due care were comprehensively treated in the charge, appellant's requested charge was unnecessary. Furthermore, it might have confused the jury, because the jury might have believed that the seaman was under a duty to disobey a negligent order, i.e., that he assumes the risk of obeying orders. Compare *Klimaszewski* v. *Pacific-Atlantic SS Co.*, 246 F. 2d 875, 877 (3 Cir. 1957).

The second request, the denial of which is asserted as error, was that the court emphasize that negligence, unlike unseaworthiness, depended on notice or knowledge. In our view, the lengthy treatment of negligence, charged in terms of ordinary or due care and the prudent man, was adequate, especially since by contrast the Court charged as to unseaworthiness that it "does not in any way depend upon reliance or fault or blame" and that "the shipowner is liable . . . even though [he] may have had no notice or knowledge."

Finally, appellant suggests that it was reversible error when the court refused to charge the jury to ignore plaintiff's counsel's argument concerning a unit of time or per diem measurement of damages for pain and suffering. Despite the fact that the great weight of authority adopts a flat rule, either approving or disapproving such argument, see the cases collected in *Johnson* v. *Colglazier*, 348 F. 2d 420 (5 Cir. 1965), we are unwilling to adopt such a rule. See *Pennsylvania R. Co.* v. *McKinley*, 288 F. 2d 262 (6 Cir. 1961). We do not necessarily agree, however, with that language of *McKinley* which suggests that the appellate court will reverse only if there resulted

"a miscarriage of justice or deprived one of the parties litigant of a fair trial." 288 F. 2d at 267.

We do hold that under the circumstances of this case as disclosed by the record before us, it was proper to deny the request. While the argument itself was not reported, and therefore is not before us, a circumstance we regret, there is no suggestion that there was an improper appeal to passion and prejudice other than the bare words used. Furthermore, as the trial judge noted, plaintiff's counsel indicated that his figures were only suggested, that the jury might find them too high or too low, and that it was the jury's determination that controlled.

We have examined appellant's other points, and find them to be without merit.

Affirmed.

Judgment, Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of May one thousand nine hundred and sixty-six.

Present: HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. WILFRED FEINBERG,
Circuit Judges.

JOHN A. RUSH,

Plaintiff-Appellee,

v.

CARGO SHIPS & TANKERS, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment, Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk.

JUDGMENT ENTERED 7-19-66

JOHN J. OLEAR, JR.
Clerk.

A true copy,

A. DANIEL FUSARO
Clerk.

VINCENT A. CARLIN
Chief Deputy Clerk.

U. S. District Court.
Filed
JUL 18 1966
S. D. OF N. Y.

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOHN A. RUSH,

Plaintiff-Appellee,

v.

CARGO SHIPS & TANKERS, INC.,

Defendant-Appellant-Petitioner.

Before: SMITH, KAUFMAN and FEINBERG,

Circuit Judges.

PETITION FOR REHEARING

Petition for rehearing denied.

J.J.S.
I.R.K.
W.F.
U.S.C.JJ.

June 14, 1966.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

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CARGO SHIPS & TANKERS, INC.,
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Question Presented

In a seaman's Jones Act suit where the verdict is not claimed to be excessive, is it reversible error for the trial court to deny defendant's motion to charge the jury to disregard the suggestion of plaintiff's counsel on summation, that pain and suffering be measured in dollars on a "unit of time" basis where he also stated that the figures were only suggested, that the jury might find them too high or too low and that their determination controlled?

Statement

Respondent's proof of the serious, permanent and painful nature of his injuries was not contested by

the petitioner who did not call its examining physician. That physician's report received in evidence over petitioner's objection disclosed that respondent had suffered permanent and painful injuries. Petitioner did not move to set aside the verdict for excessiveness or claim that it was excessive on appeal.

Reasons for Denial of the Writ

1. *There is no defined conflict between the holdings of the United States Courts of Appeals for the Second, Fifth and Sixth Circuits.*

The Court of Appeals in answering in the negative the question respondent presents here, refused to formulate any general rule approving or disapproving the "unit of time" argument, holding only "that under the circumstances of this case as disclosed by the record before us, it was proper" for the trial court to deny petitioner's motion. The court did not pronounce a rule of law in conflict with *Pennsylvania R. Co.* v. *McKinley,* 288 F2d 262, 267 (6 Cir. 1961) or *Johnson* v. *Colglazier,* 348 F2d 420, 424, 425 (5 Cir. 1965). In *McKinley* the verdict was not excessive, there was no appeal to passion or prejudice and the court refused to reverse because of the use of the "unit of time" argument; it also refused to "choose between the so-called Botta* rule and those authorities which appear to approve" of the "unit of time" argument, or to

---

* The rule pronounced by the Supreme Court of the State of New Jersey in *Botta* v. *Brunner,* 1958, 26 N.J. 82, forbidding the use of "unit of time" argument.

"announce a procedural blueprint to be followed in all future trials"; the court stated that the control of such argument was the "duty and responsibility of the trial judge" and that it would reverse only where the exercise of his discretionary control "resulted in a miscarriage of justice or deprived one of the parties litigant of a fair trial." While here the Court of Appeals expressly refused to agree with the language of *McKinley* limiting reversal to cases of "miscarriage of justice" or deprivation of "a fair trial", it made no contrary pronouncement. Conflict between the Second and Sixth Circuits can arise only out of future cases. In *Johnson* counsel abused the "unit of time" argument to appeal to the passion, prejudice and sympathy of the jury; that element is absent here and in *McKinley*. While the Court of Appeals for the Sixth Circuit adopted a flat rule rejecting "unit of time" argument, it is not in conflict with *McKinley* or the case at bar; the Courts of Appeal in those cases expressly refused to make a choice and pronounce a rule of approval or disapproval.

2. *The question presented is not of sufficient importance to require adjudication by this court.*

The right of a federal judge not only "to guide and instruct the jury", but to comment on the evidence after the summation of counsel and his "control over excessive verdicts" afford adequate protection to defendants in personal injury litigation, *Socony-Vacuum Oil Co.* v. *Smith*, 305 U.S. 424, 433. There is no reason for this court to pronounce a "procedural blueprint" for future trials, *Pennsylvania R. Co.* v. *McKinley* (Supra, p. 2).

3. *The facts of this case do not make a sufficient foundation on which to formulate an adequate workable rule on the use of the "unit of time" argument.*

The "unit of time" argument of respondent's counsel was not reported and it was made only as a suggestion; the jury was told that they might find the figures suggested too high or too low and that their determination of the value of pain and suffering controlled. Mere suggestion even where recorded is an insufficient basis on which to promulgate a rule for future cases. Without a record there is no basis on which to formulate an adequate workable rule.

4. *The summation not having been recorded the question posed is purely academic.*

This Court will review and adjudicate only on the record below, *Thomson* v. *Gaskill,* 315 U.S. 442, 446.

CONCLUSION

For the reasons stated a writ of certiorari should be denied.

Respectfully submitted,

GEORGE J. ENGELMAN
Attorney for Respondent.